

RECEIVED

2014 MAY 20 PM 2: 50

IDAHO PUBLIC
UTILITIES COMMISSION

JENNIFER REINHARDT-TESSMER
Corporate Counsel
jreinhardt-tessmer@idahopower.com

May 20, 2014

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Re: Case No. IPC-E-14-10
Declaratory Ruling Regarding Rights and Obligations Under Schedule 15 –
Idaho Power Company's Petition

Dear Ms. Jewell:

Enclosed for filing in the above matter please find an original and seven (7) copies of Idaho Power Company's Petition for a Declaratory Ruling Regarding Its Rights and Obligations with Regard to Off-Street Lighting.

Very truly yours,



Jennifer Reinhardt-Tessmer

JRT:csb
Enclosures

JENNIFER REINHARDT-TESSMER (ISB No. 7432)
Idaho Power Company
1221 West Idaho Street (83702)
P.O. Box 70
Boise, Idaho 83707
Telephone: (208) 388-5104
Facsimile: (208) 388-6936
jreinhardt-tessmer@idahopower.com

RECEIVED
2014 MAY 20 PM 2:50
IDAHO PUBLIC
UTILITIES COMMISSION

JOSEPH N. PIRTLE (ISB No. 6973)
ELAM & BURKE, P.A.
251 East Front Street, Suite 300 (83702)
P.O. Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
jnp@elamburke.com

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)	
IDAHO POWER COMPANY FOR A)	CASE NO. IPC-E-14-10
DECLARATORY RULING REGARDING)	
ITS RIGHTS AND OBLIGATIONS)	IDAHO POWER COMPANY'S
UNDER SCHEDULE 15.)	PETITION FOR A DECLARATORY
)	RULING REGARDING ITS RIGHTS
)	AND OBLIGATIONS WITH REGARD
)	TO OFF-STREET LIGHTING
)	

COMES NOW, Idaho Power Company ("Idaho Power" or "Company"), and pursuant to RP 101, hereby moves the Idaho Public Utilities Commission ("Commission") to issue a declaratory ruling determining Idaho Power's rights and obligations specific to its duty to provide off-street lighting under I.P.U.C. No. 29, Tariff No. 101, Schedule 15, Dusk to Dawn Customer Lighting ("Schedule 15") and,

specifically, whether Idaho Power has a duty to find a technology to provide off-street lighting under Schedule 15 in a manner that does not allow for light to shine on another's property. Because a related matter impacted by the Commission's ruling on this Petition is set for court trial in Ada County on July 9, 2014, Idaho Power respectfully requests the Commission issue its ruling on or before July 3, 2014. Understanding the Commission's resource limitations and its potential inability to issue a ruling by this date, Idaho Power recently filed a motion to postpone that trial to ensure the Court and the parties are able to receive the benefit of the Commission's ruling on this Petition prior to the commencement of trial. The Court has not yet ruled on that motion.

I. INTRODUCTION

1. Idaho Power was made a party to a long-standing dispute between two Boise neighbors—Kathy Anderson (“Anderson”) and Steve Alkire (“Alkire”)—over Anderson's use of off-street lighting (“OSL”) services provided by Idaho Power under Schedule 15. Alkire, who is an Idaho-licensed attorney practicing in Boise, claims that the OSL shines light in his backyard at night and constitutes a nuisance. (See Complaint attached hereto as Attachment 1.) Despite Idaho Power's several attempts at appeasing both Anderson and Alkire by changing the lighting fixtures, adding and installing shields, looking into potential alternative locations (to no avail), changing the types of bulbs and lenses within the fixtures, installing luminaries and shields utilized by Idaho Power in its service territories with dark-sky ordinances, lowering and extending the mast, painting the inside of the fixtures and lenses black, and ultimately requesting permission from Anderson to disconnect the light, Idaho Power has run out of feasible options for solving this dispute while still fulfilling its legal obligation to provide service as

required by *Idaho Code* § 61-302 and Schedule 15. As such, Idaho Power respectfully requests that the Commission issue a declaratory ruling regarding Idaho Power's rights and obligations under Schedule 15, specifically finding that Idaho Power has a legal duty to provide OSL services under Schedule 15 and that it does not have an obligation to locate and make available lighting technology that prevents any light from shining on another's property.

II. BACKGROUND

2. The OSL at issue in this Petition was originally installed in 1988. It is attached to an Idaho Power pole located in an alley between Anderson's and Alkire's respective properties in the north end of Boise. Aside from regular maintenance, there were no problems with the OSL until March 2012, when Alkire contacted Idaho Power stating that the OSL caused light to shine in his backyard at night. On March 27, 2012, Idaho Power installed a shield in an effort to address Alkire's concerns. Idaho Power understood the matter to be resolved at that point. However, during the summer of 2013, Alkire again complained of the OSL shining in his backyard at night. In July 2013, Idaho Power installed additional shielding and painted the inside of the lighting fixture black. Alkire has admitted on multiple occasions that the fixture and lighting in place in July 2013 remedied his concerns before the shielding reportedly was dislodged during a storm.

3. On October 7, 2013, Alkire filed a *pro se* Complaint in the District Court of the Fourth Judicial District of the State of Idaho, Ada County, alleging a nuisance caused by the OSL and naming Idaho Power and John Does I-X as defendants. (See the Complaint, Attachment 1). Specifically, Alkire's Complaint alleges that the OSL

illuminates a large portion of his property and that the light from the OSL invades Alkire's quiet enjoyment of his property. Alkire's Complaint seeks the entry of an order permanently turning off the OSL.

4. Shortly after being served with the Complaint and Summons, Idaho Power made several attempts to address Alkire's concerns. On October 24, 2013, Idaho Power repainted the lighting fixture black and installed three separate shields to block light. Alkire responded by letter dated October 25, 2013, claiming that he could see the bottom of the light bulb from the OSL located on the pole approximately 20 feet from his property line and that Idaho Power's efforts to shield the light were insufficient. On November 6, 2013, Idaho Power installed a new directional flood light with a 200 watt bulb and an extension to ensure that the light was directed straight down. An Idaho Power representative was on site at night and confirmed that no light shined in Alkire's backyard. This was still unacceptable to Alkire. On November 11, 2013, Idaho Power removed the directional flood light, attached a six-foot mast arm to the existing pole, switched the 200 watt bulb to a 100 watt bulb, and installed a dark sky lens. This too was unacceptable to Alkire.

5. Idaho Power filed its Answer to Alkire's Complaint on November 8, 2013. Therein, Idaho Power denied that the OSL caused a nuisance and asserted several affirmative defenses, including, but not limited to, lack of jurisdiction and that OSL is authorized by statute, the Idaho Public Utilities Commission Rules and/or tariffs. Alkire later filed an Amended Complaint naming Anderson as a party. Anderson answered the Amended Complaint, denying that the OSL caused a nuisance.

6. Idaho Power filed a Motion to Dismiss Alkire's nuisance claim under Idaho Rule of Civil Procedure 12(b)(6), arguing that its conduct was authorized by statute and that it therefore could not be liable for a nuisance as a matter of law pursuant to *Idaho Code* § 52-508—"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." (See Attachment 2 attached hereto). During a hearing on April 16, 2014, on Idaho Power's Motion to Dismiss, Ada County Magistrate Judge Patricia Young engaged counsel in a discussion about resolving the case. During that discussion, Alkire acknowledged that the fixture installed in July 2013 worked to his satisfaction:

THE COURT: So did the light work, as counsel represents, that they put up last summer?

MR. ALKIRE: There was about a one-week period where they were -- they did install a shade. They didn't adjust the light. They shaded the light. But that shade was not very sturdy. And, about a week after it was installed, it blew away. So --

THE COURT: So it was -- it sort of worked, but it wasn't -- the design wasn't sufficient to be a permanent fix?

MR. ALKIRE: Exactly. It was just a -- it was like a piece of cardboard stuck up there. And --

THE COURT: But it did do the job, if it was designed so that it was permanent?

MR. ALKIRE: Well, yeah. If they shade the light so it doesn't shine on my property, I don't have a problem. And --

(See Transcript of Audiotaped Proceedings, Attachment 3, p. 23, l. 19 – p. 24, l. 12)(emphasis added)). Later in the hearing, Judge Young stated her intended ruling in the event the OSL was determined to be a nuisance:

THE COURT: . . . I'm not going to order that it be turned off.

I am going to order -- the most that I would order is that they figure it out, that there is some light in the backyard.

(Attachment 3, p. 35, l. 23 – p. 36, l. 3). Judge Young ultimately denied Idaho Power's Motion to Dismiss and stated her interpretation of Idaho Power's duties relative to dusk to dawn lighting services as follows:

THE COURT: Okay. I am -- I agree with Idaho Power that they are obligated to provide light to customers from dusk to dawn, if requested, so in terms of dismissing. But I disagree that they cannot be responsible for creating a nuisance that the light they're providing to a customer also lights a non-customer who does not want the light and who can show, potentially, that it's harmful and that it's a nuisance. And I think harmful is part of what needs to be shown, not just preference.

And so I'm going to deny the motion to dismiss, but with that understanding that the question is whether or not there is a responsibility on the part of Idaho Power to ensure when they provide the light, they don't provide for other people who do not want it. They can show that it's harmful and a nuisance to them.

(Attachment 3, p. 48, l. 14 – p. 49, l. 7) (emphasis added).

7. Since the hearing on April 16, 2014, Idaho Power has installed two separate light fixtures in an effort to resolve the matter. The first light fixture was installed in late April 2014 and was identical to the fixture installed in July 2013. Nevertheless, that light fixture was unacceptable to Alkire. On May 9, 2014, Idaho Power installed a dark sky fixture and painted the inside of the fixture black. Idaho Power requested feedback from Alkire on whether that fixture resolved his concerns but has not received a response from Alkire as of the date of this Petition.

8. The nuisance case is currently set for a one-day court trial to commence on July 9, 2014.

III. DECLARATORY RULING SOUGHT BY IDAHO POWER

9. Idaho Power does not seek a determination as to whether or not Anderson's OSL service creates a nuisance (the issue currently before the district court); rather, the Company seeks a declaratory ruling from the Commission determining Idaho Power's rights and obligations as a utility providing off-street lighting pursuant to Schedule 15.

10. Specifically, Idaho Power requests a ruling that as a utility, mandated by statute to provide service, it is not obligated to expend resources to create or locate a new technology that would prevent off-street lighting from shining on another's property (an expense that will ultimately be borne by customers). As the entity charged by the Legislature with overseeing and regulating utilities like Idaho Power, the Commission is the appropriate entity to determine the Company's rights and obligations with regard to providing off-street lighting, as requested in this Petition. Additionally, the Commission is highly educated on the nature of the utility industry and the unique challenges faced by utilities in providing efficient, reliable, cost-effective service to all of its customers.

IV. IDAHO POWER'S INTEREST IN THE MATTER AND THE FACTS AND LAW IN SUPPORT OF THE COMPANY'S PETITION

11. Idaho Power has a duty to provide electrical service to its customers pursuant to *Idaho Code* § 61-302, which mandates that public utilities furnish, provide, and maintain services that promote the safety, health, comfort, and convenience of its patrons, employees, and the public. Additionally, *Idaho Code* §§ 61-502 and 61-503 empower the Commission to enact and promulgate rules and regulations relating to any public utility and the services the utility provides to its customers. Pursuant to that authority, the Commission approves certain tariffs that set forth the rights and

responsibilities of Idaho Power and its customers. Rule A of Idaho Power's tariff sets forth that Idaho Power, and all customers to whom it supplies electrical service, are bound by the Commission's regulations.

12. Idaho Power's tariff includes schedules of the services provided by Idaho Power, which must be filed with the Commission pursuant to *Idaho Code* § 61-305. Schedule 15 addresses Idaho Power's electric service for outdoor dusk to dawn lighting of commercial, industrial, and residential customer grounds, yards, driveways, and premises. Those services are provided by luminaries mounted on existing poles owned by Idaho Power, or upon customer-owned poles with approval by Idaho Power. The facilities required for supplying the dusk to dawn lighting are supplied, installed, owned, and maintained by Idaho Power in accordance with its standards and specifications. Idaho Power has an interest in continuing to provide electrical services to its customers as authorized under Tariff 101. Idaho Power seeks guidance from the Commission as to how it can provide dusk to dawn lighting services in compliance with its duties under Schedule 15 given Judge Young's recent comments in the nuisance case—" . . . the question is whether or not there is a responsibility on the part of Idaho Power to ensure when they provide the light, they don't provide for other people who do not want it." Judge Young suggested during the recent hearing that a "designer" employed by Idaho Power could work to manufacture a new technology to alleviate Alkire's purported problem. While Idaho Power currently utilizes the technology widely available in the form of lenses and shields to assist in situations like this, it is an alarming proposition

that Idaho Power would be obligated to find or create a new technology,¹ which it would somehow have to make available to *all* customers, not just Alkire, and at the expense of other customers.

13. Idaho Power respectfully requests that the Commission grant expedited treatment to this Petition given the pending nuisance case and the trial set to commence on July 9, 2014.

V. IDAHO POWER'S RECOMMENDATION

14. Idaho Power respectfully recommends that the Commission determine that as a utility mandated by statute to provide service, Idaho Power is not obligated to find or create a new lighting technology that prevents light from a Schedule 15 OSL from shining on another person's property.

VI. SERVICE OF DOCUMENTS

15. Service of pleadings, exhibits, orders, and other documents relating to this proceeding should be served on the following:

Jennifer Reinhardt-Tessmer
Idaho Power Company
P.O. Box 70
Boise, Idaho 83707
jreinhardt-tessmer@idahopower.com

Joseph N. Pirtle
ELAM & BURKE, P.A.
P.O. Box 1539
Boise, Idaho 83701
jnp@elamburke.com

VII. CONCLUSION

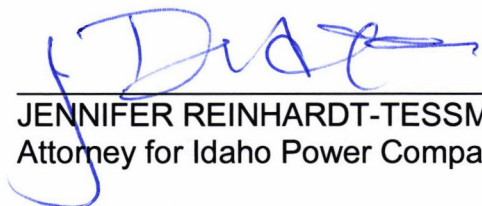
WHEREFORE, based on the foregoing, Idaho Power respectfully requests that the Commission grant this Petition and issue an order declaring that Idaho Power does not have a duty under Schedule 15 to find a technology to provide off-street lighting in a manner that prevents light from shining on another's property.

¹ Research and development of lighting fixtures is not part of Idaho Power's business. Idaho Power is not aware of a lighting fixture currently available that it could offer to its customers that would solve the issue of which Mr. Alkire complains.

Idaho Power further requests that the Commission grant Idaho Power's request for expedited treatment of this Petition and issue an order on or before July 3, 2014, or as soon thereafter as the Commission is able.

Idaho Power does not believe that an evidentiary hearing is necessary to consider the issue presented by this Petition and requests, pursuant to RP 201, that the matter be processed under modified procedure.

DATED at Boise, Idaho, this 20th day of May 2014.



JENNIFER REINHARDT-TESSMER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May 2014 I served a true and correct copy of IDAHO POWER COMPANY'S PETITION FOR A DECLARATORY RULING REGARDING ITS RIGHTS AND OBLIGATIONS WITH REGARD TO OFF-STREET LIGHTING upon the following named parties by the method indicated below, and addressed to the following:

Steven E. Alkire
908 East Bannock Street
Boise, Idaho 83712

☐ Hand Delivered
☒ U.S. Mail
☐ Overnight Mail
☐ FAX
☐ Email

Kathy J. Edwards
EDWARDS LAW OFFICE
23 9th Avenue North
P.O. Box 403
Nampa, Idaho 83653

☐ Hand Delivered
☒ U.S. Mail
☐ Overnight Mail
☐ FAX
☐ Email


Christa Beary, Legal Assistant

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

CASE NO. IPC-E-14-10

IDAHO POWER COMPANY

ATTACHMENT 1

Steven E. Alkire, #3964
908 E Bannock St.
Boise ID 83712-7912
Pro Se
(208) 724-6361

Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

Steven E. Alkire,

Plaintiff,

vs.

IDAHO POWER COMPANY and JOHN
DOES I through V,

Defendant.

Case No. _____

CV 00 1317836

COMPLAINT

Filing Fee: \$96.00

COMES NOW the Plaintiff, STEVEN E. ALKIRE ("Plaintiff"), and states the following
for his Complaint against the above-referenced Defendants as follows:

1. Defendant Idaho Power Company owns and controls certain poles embedded in the ground and used, *inter alia*, for the support of power lines and located in the alley way running parallel and between E. Jefferson St. and E. Bannock St. and perpendicular to and between N. Elm Avenue and N. Maple Avenue in the City of Boise, County of Ada, State of Idaho.

2. One of the previously described poles is located about 27 feet east of Elm Avenue in the City of Boise, Idaho and bears an identifying number of 300310 on said pole.

NO. _____
FILED _____
A.M. _____ P.M. _____

OCT 07 2013

CHRISTOPHER D. RICH, Clerk
By ELYSHIA HOLMES
DEPUTY

3. Idaho Power Company has installed on the Subject Pole a lamp of the type commonly referred to as a "street lamp" (the "Subject Street Lamp").

4. Idaho Power Company maintains the Subject Street Lamp.

5. Upon knowledge and belief, Idaho Power Company installed and maintains the Subject Street Lamp pursuant to a contract with one or more unknown person(s) referred to herein as John Does I through V.

6. Upon knowledge and belief, John Does I through V and/or one or some of them, has paid and/or currently pays Idaho Power Company for installing, maintaining, and powering the Subject Street Lamp.

7. Steven E. Alkire, plaintiff in the above captioned matter, owns certain real property commonly referred to as 908 East Bannock Street, Boise, Idaho 83712 and legally described as: Lots 22 and 23 in Block 7 of Eastside Addition, according to the plat thereof, filed in Book 1 of Plats at Page 6, records of Ada County, Idaho, (the "Alkire Property").

8. The Subject Street Lamp turns on in the evening and remains lighted until dawn.

9. The Subject Street Lamp illuminates a large portion of the Alkire Property.

10. The light cast by the Subject Street Lamp on the Alkire Property invades the quiet enjoyment of the Alkire Property by plaintiff and is a nuisance.

For the foregoing reasons, plaintiff prays this court will:

1. Order the Subject Street Lamp permanently turned off;
2. Award attorney fees and costs to plaintiff; and,
3. Provide such additional relief as the Court may determine.

DATED this 1 day of October, 2013.

By Steven E. Alkire
Steven E. Alkire

VERIFICATION

STATE OF IDAHO)
)ss.
County of Ada)

Steven E. Alkire, being duly sworn, deposes and says:

That he is the Plaintiff in the above-captioned matter, that he has read the foregoing **VERIFIED COMPLAINT**, knows the contents thereof, and the same are true to the best of his knowledge, information, and belief.

Steven E. Alkire

SUBSCRIBED AND SWORN to before me this 14 day of October, 2013.



Notary Public for the State of Idaho
My Commission Expires: 4/3/18

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

CASE NO. IPC-E-14-10

IDAHO POWER COMPANY

ATTACHMENT 2

NOV 25 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

James A. Ford
Joseph N. Pirtle
ELAM & BURKE, P.A.
251 E. Front Street, Suite 300
Post Office Box 1539
Boise, ID 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
jaf@elamburke.com
jnp@elamburke.com
Ford – ISB No. 3410
Pirtle – ISB No. 6973

Adam Richins
Jennifer Reinhardt-Tessmer
IDAHO POWER COMPANY
1221 W. Idaho St.
Boise, ID 83702
Telephone: (208) 388-2682
Fax: (208) 388-6936
arichins@idahopower.com
jreinhardt@idahopower.com
Richins – ISB No. 7521
Reinhardt-Tessmer – ISB No. 7432

Attorneys for Defendant Idaho Power Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STEVE E. ALKIRE,

Plaintiff,

v.

IDAHO POWER COMPANY and JOHN
DOES I through V,

Defendants.

Case No. CV-OC-1317836

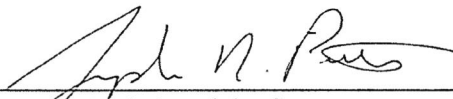
IDAHO POWER COMPANY'S
MOTION TO DISMISS

COPY

Defendant, Idaho Power Company ("Idaho Power"), by and through its counsel of record, Elam & Burke, P.A., respectfully moves for the entry of an order dismissing Plaintiff's Complaint against Idaho Power, with prejudice, pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure. Specifically, Plaintiff's Complaint alleges conduct by Idaho Power which is authorized by statute and therefore cannot be a nuisance as a matter of law.

DATED this 25 day of November, 2013.

ELAM & BURKE, P.A.

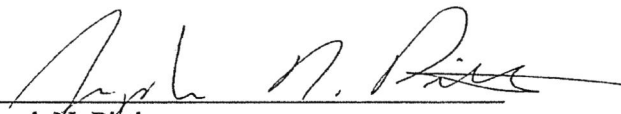
By: 
Joseph N. Pirtle, of the firm
Attorneys for Defendant Idaho Power

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of November, 2013, I caused a true and correct copy of the foregoing document to be served as follows:

Steven E. Alkire
908 E. Bannock St.
Boise, ID 83712

☒ U.S. Mail
☐ Hand Delivery
☐ Federal Express
☐ Via Facsimile


Joseph N. Pirtle

NO. _____
FILED
A.M. _____ P.M. _____

NOV 25 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

James A. Ford
Joseph N. Pirtle
ELAM & BURKE, P.A.
251 E. Front Street, Suite 300
Post Office Box 1539
Boise, ID 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
jaf@elamburke.com
jnp@elamburke.com
Ford – ISB No. 3410
Pirtle – ISB No. 6973

Adam Richins
Jennifer Reinhardt-Tessmer
IDAHO POWER COMPANY
1221 W. Idaho St.
Boise, ID 83702
Telephone: (208) 388-2682
Fax: (208) 388-6936
arichins@idahopower.com
jreinhardt@idahopower.com
Richins – ISB No. 7521
Reinhardt-Tessmer – ISB No. 7432

Attorneys for Defendant Idaho Power Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STEVE E. ALKIRE,

Plaintiff,

v.

IDAHO POWER COMPANY and JOHN
DOES I through V,

Defendants.

Case No. CV-OC-1317836

MEMORANDUM IN SUPPORT OF
IDAHO POWER COMPANY'S
MOTION TO DISMISS

COPY

INTRODUCTION

Defendant, Idaho Power Company ("Idaho Power"), by and through its counsel of record, Elam & Burke, P.A., files this Memorandum in support of its Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure. Plaintiff's Complaint should be dismissed because it fails to state a claim against Idaho Power upon which relief can be granted. Specifically, Idaho Power's alleged conduct is authorized by statute and therefore cannot be a nuisance as a matter of law.

Further, it is important to note that this case appears to be one of many issues in an ongoing dispute between neighbors. Idaho Power first became aware of this issue when it was named as a party in this case for providing electric services to a customer – identified in Plaintiff's Complaint as John Doe I– who uses those services in a way which Plaintiff alleges is a nuisance. It is unclear to Idaho Power why it was named as a party in this case, especially given that Idaho Power is not alleged to have acted wrongfully in any way. In any event, and as detailed below, the provision of electric services is specifically authorized by statute, and Plaintiff's claim against Idaho Power therefore fails as a matter of law.

FACTS AND PROCEDURAL HISTORY

Plaintiff filed his Complaint on October 7, 2013. Plaintiff's Complaint generally alleges that Idaho Power owns and controls a pole embedded in the ground located in the alley way near Plaintiff's property; that Idaho Power installed a lamp on the pole; that Idaho Power maintains the lamp and the pole pursuant to a contract with one or more unknown persons who pay for the lighting service; that the lamp turns on at night and remains on until dawn; and that the lamp illuminates a large portion of Plaintiff's property and is a nuisance. (Complaint, pp. 1-2).

Idaho Power filed its Answer to the Complaint on November 8, 2013, asserting several affirmative defenses. The Answer admits that a lamp is mounted on a pole, and that Idaho Power installed and maintains the facilities required to supply dusk to dawn customer lighting pursuant to a contract with one or more persons who are not named parties to this action. (Answer, pp. 2-3).

GOVERNING STANDARDS

Idaho Rule of Civil Procedure 12(b)(6) sets forth the defense of failure to state a claim upon which relief can be granted.

A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for “a short and plain statement of the claim showing that the pleader is entitled to relief” and a demand for relief.

Harper v. Harper, 122 Idaho 535, 536, 835 P.2d 1346 (Ct.App. 1992) (quoting I.R.C.P. 12(b)(6)). When considering a motion to dismiss, the court looks only at the pleadings, and all inferences are viewed in favor of the non-moving party.” *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005).

Additionally, this Court may take judicial notice of whatever is established by law. I.C. § 9-101. As is particularly relevant in this case, this Court may take judicial notice of orders adopted by the Idaho Public Utilities Commission. *Probart v. Idaho Power Co.*, 74 Idaho 119, 125, 258 P.2d 361 (1953) (citations omitted) (“It is the duty of and the supreme court will take judicial notice of an order of the Public Utilities Commission adopted in accordance with and pursuant to statutory authority.”)

ANALYSIS

I.

PLAINTIFF'S COMPLAINT FAILS TO STATE A NUISANCE CLAIM AGAINST IDAHO POWER AND SHOULD BE DISMISSED

Plaintiff's Complaint asserts a single claim for nuisance, which the Idaho Code defines as follows:

Nuisance defined. – Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction of the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

I.C. § 52-101. The Idaho Code also clearly defines that which is not a nuisance: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

I.C. § 52-108 (emphasis added).

A. Plaintiff's Nuisance Claim Fails as a Matter of Law Because Idaho Power's Conduct is Authorized by Statute.

Idaho Power has a duty to provide electrical service to its customers pursuant to Idaho Code § 61-302, which mandates that public utilities furnish, provide and maintain services that promote the safety, health, comfort and convenience of its patrons, employees and the public. Additionally, Idaho Code §§ 61-502 and 61-503 empower the Idaho Public Utilities Commission ("P.U.C.")¹ to enact and promulgate rules and regulations relating to any public utility and the services the utility provides to its customers. Pursuant to that authority, the P.U.C. approves certain tariffs that set forth the rights and responsibilities of Idaho Power and its customers. Tariff No. 101 is entitled "General Rules, Regulations and Rates Applicable to Electric Service

¹ Idaho Power is subject to the jurisdiction, control and regulation of P.U.C. pursuant to I.C. § 61-129.

in the Territory Served from the Company's Interconnected System in Idaho." I.P.U.C. No. 29
Tariff No. 101. Rule A of Tariff No. 101 sets forth that Idaho Power, and all customers to whom
it supplies electrical service, are bound by the P.U.C.'s regulations. All Tariffs are publicly
available, but a true and correct copy of Rule A of Tariff No. 101 is attached hereto as Exhibit A
for the convenience of this Court.

Tariff No. 101 includes schedules of the services provided by Idaho Power, which must
be filed with the P.U.C. pursuant to Idaho Code § 61-305. Schedule 15 of Tariff No. 101
addresses Idaho Power's electric service for the outdoor dusk to dawn lighting of commercial,
industrial and residential customer grounds, yards, driveways and premises (hereinafter "dusk to
dawn service"). A true and correct copy of Schedule 15 is attached hereto as Exhibit B for the
convenience of this Court.

Schedule 15 authorizes Idaho Power to provide electric service for the outdoor dusk to
dawn lighting of commercial, industrial and residential customer grounds, yards, driveways and
premises. (Exhibit B, attached hereto.) Those services are provided by luminaries mounted on
existing poles owned by Idaho Power, or upon customer-owned poles with approval by Idaho
Power. (*Id.*) The facilities required for supplying the dusk to dawn lighting are supplied,
installed, owned and maintained by Idaho Power in accordance with its standards and
specifications. (*Id.*) Schedule 15 was approved by the P.U.C. on February 29, 2008 in Order
No. 30508, and was effective on March 1, 2008.

Plaintiff's Complaint alleges conduct by Idaho Power which is clearly authorized by
statute. Specifically, Plaintiff's Complaint alleges that Idaho Power installed and maintains a
lamp pursuant to a contract with one or more unknown person(s); that the lamp is on from night
until dawn; and that Idaho Power has been paid for providing that service. Assuming those facts

to be true, Plaintiff's nuisance claim against Idaho Power fails because Idaho Power's alleged conduct – the provision of dusk to dawn lighting service for its customers – is conduct that is done under the express authority of Idaho Code § 61-302 and in accordance with Tariff No. 101, Schedule 15. Since Idaho Power's alleged conduct is authorized by statute, it cannot be deemed a nuisance as a matter of law. I.C. § 52-108.

To the extent that Plaintiff believes customers should not be able to receive dusk to dawn lighting according to the terms set forth in Schedule 15 of Tariff No. 101, this is clearly not the proper forum for Plaintiff to raise the issue. Rather, Plaintiff is required to address such a challenge before the P.U.C. I.C. § 61-334A.

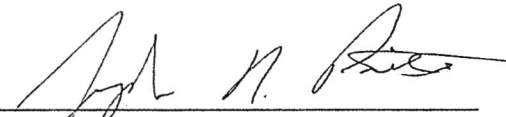
It appears that Plaintiff's true complaint is against his neighbor. This case is akin to a nuisance claim against Idaho Power for supplying electricity used by a neighbor to play loud music late at night. In such a case Plaintiff's dispute would be with the individual playing music loudly at night, not Idaho Power. This case is no different. Plaintiff's Complaint challenges his neighbor's use of the electrical services supplied by Idaho Power in accordance with governing law. Plaintiff's remedy, to the extent that he has one, is against his neighbor and not Idaho Power.

CONCLUSION

The dusk to dawn lighting service provided by Idaho Power is expressly authorized by statute. That which is done or maintained under the express authority of a statute is not a nuisance as a matter of law. I.C. § 52-108. Plaintiff cannot state a valid claim against Idaho Power upon which relief can be granted, and his Complaint should be dismissed with prejudice pursuant to Idaho Rule of Civil Procedure 12(b)(6).

DATED this 25 day of November, 2013.

ELAM & BURKE, P.A.

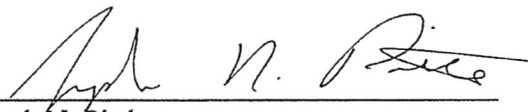
By: 
Joseph N. Pirtle, of the firm
Attorneys for Defendant Idaho Power

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of November, 2013, I caused a true and correct copy of the foregoing document to be served as follows:

Steven E. Alkire
908 E. Bannock St.
Boise, ID 83712

☒ U.S. Mail
☐ Hand Delivery
☐ Federal Express
☐ Via Facsimile


Joseph N. Pirtle

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

CASE NO. IPC-E-14-10

IDAHO POWER COMPANY

ATTACHMENT 3

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

----- x Case No. CVOC-2013-17836
STEVEN E. ALKIRE, :
 :
 : Plaintiff, :
 :
 : vs. :
 :
 : IDAHO POWER CO. and KATHY ANDERSON, :
 :
 : Defendants. :
 :
----- x

NO. _____
A.M. _____ FILED P.M. _____
MAY 08 2014
CHRISTOPHER D. RICH, Clerk
By RAE ANN NIXON
DEPUTY

TRANSCRIPT OF AUDIOTAPED PROCEEDINGS

Held on April 16, 2014, before
Honorable Patricia Young, District Court Judge.

Transcribed by
Tiffany Fisher, RPR
CSR No. 979

COPY

A P P E A R A N C E S

FOR THE PLAINTIFF

Steven Alkire, Pro Se

FOR DEFENDANT, IDAHO POWER CO.

Joseph Pirtle
ELAM & BURKE
251 East Front Street, Suite 300
Boise, Idaho 83702

FOR DEFENDANT, KATHY ANDERSON

Kathy Edwards
EDWARDS LAW OFFICE, PLLC
1004 7th Street S
Nampa, Idaho 83651

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

----- x Case No. CVOC-2013-17836

STEVEN E. ALKIRE,

Plaintiff,

vs.

IDAHO POWER CO. and KATHY ANDERSON,

Defendants.

----- x

TRANSCRIPT OF AUDIOTAPED PROCEEDINGS

Held on April 16, 2014, before

Honorable Patricia Young, District Court Judge.

Transcribed by
Tiffany Fisher, RPR
CSR No. 979

APPEARANCES

FOR THE PLAINTIFF

Steven Alkire, Pro Se

FOR DEFENDANT, IDAHO POWER CO.

Joseph Pirtle
ELAM & BURKE
251 East Front Street, Suite 300
Boise, Idaho 83702

FOR DEFENDANT, KATHY ANDERSON

Kathy Edwards
EDWARDS LAW OFFICE, PLLC
1004 7th Street S
Nampa, Idaho 83651

April 16, 2014
BOISE, IDAHO

[Onset of audio]

THE COURT: I kind of grew up in that
neighborhood, so I know the neighborhood, and --
sort of.

And I just think this whole thing of
light and the technology that's available these
days, it's very hard for me to believe this isn't
resolvable and that Idaho Power doesn't have some
responsibility to have options in this kind of
situation. So I want us to talk and explore it a
little bit, because, quite frankly, if we need to
go to trial.

But I want to be really candid of what
I'm reading and stuff. And if you think I have
now gotten too much information, maybe somebody
else needs to hear it. But I think the facts of
this case need to all come out, whatever they are,
in terms of what the options are, how much light
is actually produced through the Idaho Power
light. Why you don't think -- well, so, that's
where I am.

And the argument of whether or not I

should look at the rate that you provided to me
for PUC, I view them as being pretty discretionary
on the part of Idaho Power for what kind of lights
they use.

And in terms of what -- how you've
tried to work with it in the neighborhood, I'm
also intrigued of how that light could be all the
way to -- I mean, it looks like it's a flair-out
light. It's not a focused-down light. And I know
my research shows that Boise doesn't have a dark
sky, any kind of dark sky ordinance at this point.

So -- but I don't know that that
doesn't mean it can't still be a nuisance, the
light where it's not wanted in a neighbor's yard
can't be a nuisance.

And so those are my thinkings at this
point. So I'd like to hear from Idaho Power.
And --

MR. PIRTLE: Okay. And I'm a little
confused, Your Honor. Are you wanting to hear
just generally --

THE COURT: Well --

MR. PIRTLE: -- about the case, or were you
wanting to hear arguments on the motion to
dismiss?

5

1 THE COURT: I first want to just explore a
2 little bit more of the actual facts of this case,
3 if I may.

4 MR. PIRTLE: Okay. And --

5 THE COURT: And I'd like to explore how you
6 change the lights when a customer asks for a
7 light, and what options Idaho Power has.

8 MR. PIRTLE: My understanding, Your Honor,
9 from the different types of lights, are there -- I
10 believe they're provided in the schedules under
11 that Tariff No. 101.

12 Different lighting is allowed -- or
13 available to customers depending on -- and I may
14 be butchering the terms, but I think it's the
15 wattage of the light bulb within the fixture. You
16 can have a brighter light or a dimmer light. My
17 understanding is that Ms. Anderson has the dimmest
18 light allowable, but the dimmer light also has a
19 lower rate per month that's charged to the
20 customer.

21 The light could be placed in -- my
22 understanding is I think there have been two or
23 three different fixtures that have been used at
24 this location. The first fixture was, I guess,
25 problematic for Mr. Alkire. Idaho Power came out.

7

1 MR. PIRTLE: No. They tried -- the third
2 light fixture that they tried is that -- my
3 understanding is that it's a directional light
4 fixture that you can direct the light in a
5 particular direction. But it may flair out a bit.
6 But I think the idea is you can have it up so it
7 projects more out, or down so it projects more
8 downward, than if it was just a stationary
9 fixture.

10 But that fixture, so far, has not been
11 to Mr. Alkire's satisfaction. And I think that's
12 where we are as far as the underlying facts.

13 THE COURT: But there is another fixture
14 still that could be put up?

15 MR. PIRTLE: There is another fixture. And
16 it had -- the fixtures that had been put up --
17 there was one fixture. And then, I think, the
18 second fixture that was put up, there was some
19 additional blocking that was put in. They blacked
20 out part of the light so the fixture that was
21 facing Mr. Alkire's property, the lens was
22 actually painted black so that it was blocking the
23 light. And I think that actually worked.

24 But it -- and I don't know if it was
25 the shield that blew off or the entire fixture was

6

1 And I think this was before this complaint was
2 filed. This was last summer.

3 I believe there was a light fixture
4 that was replaced, that replaced the original one.
5 That light fixture, to my understanding, was that
6 it eliminated any concerns that Mr. Alkire had as
7 far as light pollution onto his property.

8 But there was a wind storm last summer
9 that -- I don't know if it blew the fixture off
10 completely or damaged it. But, in any event, a
11 new fixture was put up, and that one was
12 problematic again.

13 I think Idaho Power, since then, has
14 offered to put the fixture that was up -- the
15 second fixture, we'll call it, the one that didn't
16 produce any light on Mr. Alkire's property. I
17 think Mr. Alkire's position was that he
18 appreciated Idaho Power doing that, but he wasn't
19 going to dismiss the case, if that was done, until
20 it was done to his satisfaction.

21 And so that hasn't gone forward,
22 because Idaho Power has tried to work with
23 everyone and isn't --

24 THE COURT: And you haven't changed out the
25 light fixture?

8

1 damaged. I think that fixture can be put back up.

2 And my understanding at least -- and,
3 of course, I'm getting into stuff that was
4 discussed during the mediation. But that was --
5 for one reason or another, it was not agreeable to
6 the extent that it would fully resolve this
7 matter, which made it problematic for Idaho Power
8 to go through and take the steps, because
9 Idaho Power has already taken several steps to try
10 to mediate or to resolve the circumstance.

11 They have tried three different light
12 fixtures. They have tried different light bulbs.
13 They have tried changing the direction. None of
14 it has been to Mr. Alkire's satisfaction, except
15 for the one that we know that works. But now,
16 even if we do that, we don't have any assurance
17 that this case will end, which makes it
18 problematic from Idaho Power's perspective.

19 THE COURT: Okay. And Mr. Alkire is the
20 only one, as far as you know, that's concerned
21 about this extra light?

22 MR. PIRTLE: Yes, Your Honor. My
23 understanding from Ms. Anderson and from others in
24 the neighborhood is that they appreciate the
25 light. It's a safety mechanism for -- my

9

1 understanding is that it's in a back alley between
2 the backyards of the houses. It provides some
3 security for the neighborhood, and the alley is
4 not dark.

5 My understanding is that Mr. Alkire is
6 the only one that has raised a complaint about
7 this particular light.

8 THE COURT: Okay. My other question, as I
9 was reviewing this file again, in your initial
10 answer, you suggested that there were other
11 channels that Mr. Alkire should have pursued
12 first, that through -- and you don't spell them
13 out.

14 But is that through the PUC?

15 MR. PIRTLE: It's through -- yes, Your
16 Honor. It's through the PUC.

17 Through the Idaho Code, public
18 utilities and their customers are bound to follow
19 the regulations and rules that are adopted by the
20 PUC. And the PUC provides a forum for customers
21 and Idaho Power to resolve disputes like this.

22 That wasn't a basis for our 12(b)6
23 motion, but it was an affirmative defense that was
24 raised. We think that this matter is really
25 appropriately before the PUC and not this court,

11

1 something that the PUC governs.

2 So it's one of those many instances
3 where we have a grey area in the law. So...

4 THE COURT: Yeah. And --

5 MR. PIRTLE: But I --

6 THE COURT: -- within the PUC, since I'm
7 not -- I'm really just intrigued by all of this.

8 Is there -- I mean, is there any kind,
9 like I say, kind of dark sky guidelines or
10 anything of that nature at this point?

11 MR. PIRTLE: Not that I'm aware of in the
12 PUC, Your Honor. I know that some cities like
13 Ketchum, Hailey, yeah, they have --

14 THE COURT: And Stanley is working on it, I
15 know.

16 MR. PIRTLE: Right. And that's a city
17 ordinance. As I understand the regulations from
18 the PUC, the PUC will adopt a tariff for each
19 utility company. And so Idaho Power's tariff is
20 Tariff No. 101. And it outlines all of the rules
21 that that particular utility must follow, the
22 regulations, and then the types of services that
23 they can provide.

24 So the dawn to dusk lighting service is
25 provided in Schedule No. 15 of Tariff No. 101. It

10

1 with all due respect.

2 THE COURT: Yes, right. Correct. But that
3 there is a mechanism that this kind of discussion
4 could be happening in front of the PUC?

5 MR. PIRTLE: Yes, Your Honor. And I think
6 that makes a lot of sense, because the PUC is so
7 intimately familiar --

8 THE COURT: But it's not sort of like a tort
9 claim where you have to first pursue that before
10 you can go to court?

11 MR. PIRTLE: No. It's more like a State
12 court claim being filed in federal court. If the
13 jurisdictional limit of damages is not high
14 enough, it really should be in State court. And
15 that's --

16 THE COURT: Correct, but it could be in both
17 places?

18 MR. PIRTLE: I think it probably should be
19 before the PUC. I don't know that it is -- that
20 this court does not specifically have
21 jurisdiction. It looks like there may be a
22 nuisance claim by statute, I think, can be brought
23 in, in the State courts. The subject of the
24 nuisance is something that deals with utility law
25 and customers of utilities. And that really is

12

1 essentially is the rule book for if you have this
2 type of lighting, what you have to have.

3 And I believe it even identifies the --
4 on the second page of Schedule No. 15, it
5 identifies the wattage, the average lumens, the
6 base rate. So you can have a -- anywhere from a
7 100-watt light to an 1,000-watt light.

8 My understanding is that this light is
9 a 100-watt light, so it was the smallest one. But
10 it was the one that has been approved by the
11 public -- the Idaho Public Utilities Commission as
12 being appropriate for this type of service.

13 But, no, in answer to the Court's
14 original question, I don't believe that this is a
15 circumstance where customers and utilities have to
16 go to the PUC, get a result, and then if somebody
17 doesn't like it, it's almost like an appeal to the
18 State court. I think the rules do allow for the
19 parties in this case to bring this case to the PUC
20 and have it be resolved by the PUC.

21 THE COURT: Okay. And in your argument of
22 dismissal, you suggest in your language just now
23 that there's sort of a battle that you have to
24 provide this lighting for customers.

25 MR. PIRTLE: It's a service.

13

1 THE COURT: So how do you comport with the
2 sentence that says, "At the request of a customer,
3 but at the sole discretion of the company, a
4 luminary may be mounted on a customer's own
5 support acceptable to the company"? I guess
6 that's the difference.

7 MR. PIRTLE: Yes.

8 THE COURT: This is not customer owned, this
9 is --

10 MR. PIRTLE: It's company owned.

11 THE COURT: -- company owned.

12 MR. PIRTLE: And my understanding, Your
13 Honor, for that --

14 THE COURT: After I read -- yeah.

15 MR. PIRTLE: -- is that Idaho Power has the
16 discretion to deny. But let's say a customer
17 wants the light mounted on a tree, they can say,
18 "Well, that's not going to be safe for a number of
19 reasons. You don't want electricity near, you
20 know, dry leaves, dry branches," something like
21 that.

22 The discretion to Idaho Power is in the
23 schedule and in the tariff. It's not that they
24 can allow or deny service. It's they have the
25 discretion to determine how that service is

15

1 of the following reasons: It's failure to pay;
2 failure to make a security deposit; failure to
3 abide by terms of payment arrangement; identity
4 misrepresentation; denial of access to a meter;
5 wasteful use of service; service to minors; and
6 there being a previous balance on an account. So
7 that's No. 302.

8 No. 303 also provides that a utility
9 may deny or terminate services without prior
10 notice, but this comes up for one or more of the
11 following reasons: It's a dangerous condition;
12 there's an order to terminate service; it's an
13 illegal use of the service; or there's an
14 inability to contact the customer.

15 And none of those circumstances address
16 the situation that we have here, so it really
17 isn't a matter of discretion to Idaho Power.
18 Idaho Power is a public utility. They cannot
19 discriminate against customers, deny service,
20 grant service to others, except for what the PUC
21 and the Idaho legislature has determined are --
22 which makes sense with the monopoly like a
23 utility.

24 So they are bound to provide the
25 service that are services that are allowed by the

14

1 rendered.

2 And I believe we said in our briefing,
3 and it may be in the reply brief, there are the
4 IDAPA sections that apply. There are some rules
5 in IDAPA that apply to this circumstance, as far
6 as a utility being allowed to deny service to a
7 customer. And I believe it's Rule Nos. 302 and
8 303.

9 As I read those rules, they are not
10 applicable in this circumstance. Because in
11 circumstances where a customer hasn't paid, a
12 customer -- their home isn't up to code, and so
13 providing electricity would cause a risk of some
14 sort of injury or damage. That's those sort of
15 circumstances.

16 And I can -- I think I may actually
17 have those, Your Honor. It's a Rule No. 302. And
18 I'm referring to page No. 4 of the reply brief.
19 Let's see.

20 Utility Customer Relations Rule No. 302
21 states that, "A utility may deny or terminate
22 service to a residential or small commercial
23 customer without the customer or applicant's
24 permission, but only after adequate notice has
25 been given." And then it states for one or more

16

1 Public Utilities Commission that has been
2 requested by their customer. The customer in this
3 case is Ms. Anderson. She has requested this dusk
4 to dawn lighting. They are providing it.

5 And they have tried to work, Your
6 Honor, with everyone, to still provide
7 Ms. Anderson the service that she's entitled to,
8 pursuant to the code, but also with Mr. Alkire's
9 interest in mind.

10 THE COURT: And -- but you're also stating
11 in terms of your options here and meeting
12 Ms. Anderson's need.

13 I mean, what she's entitled to is light
14 in her yard; right, if she requested it?

15 MR. PIRTLE: Well, she -- yeah. Let me -- I
16 think the schedule addresses this -- excuse me,
17 yeah, Schedule No. 15. It's lighting of
18 commercial, industrial, and residential customer
19 grounds, yards, driveways, and premises.

20 And, yeah, I think -- and I understand
21 the Court's concern. She's entitled to light on
22 her property, but not necessarily directing light
23 to others.

24 THE COURT: To other properties.

25 MR. PIRTLE: I understand the Court's

17

1 concern, and I think Idaho Power does, as well,
2 and has tried to find a solution that works for
3 everyone. But, unfortunately, it doesn't work for
4 Mr. Alkire. And that's --

5 THE COURT: Well, because it is going to be
6 on her property, the light?

7 MR. PIRTLE: It's my understanding that's
8 the allegation.

9 THE COURT: [Inaudible] factual question?

10 MR. PIRTLE: I think it is a factual
11 question. Because I think, at the mediation,
12 Ms. Anderson had indicated that she has been over
13 to the property, and it is not -- the light is not
14 on his property.

15 And it certainly wasn't with the second
16 fixture. And I think Idaho Power is willing to
17 put that second fixture back up, but we don't have
18 any assurance that doing so would make this case
19 go away, which is --

20 THE COURT: Or assurance that it would just
21 be on Ms. Anderson's property?

22 MR. PIRTLE: Well, I think the second light,
23 there was agreement from everyone that that light
24 wasn't -- I don't know that it was only on
25 Ms. Anderson's property, because I think it lights

19

1 MR. ALKIRE: Correct.

2 MS. ANDERSON: My only question is, it's at
3 the end of the property of the first house between
4 the first and second house in the alley?

5 THE COURT: Well, I saw -- what I saw when I
6 drove down the alley is a big light more near
7 Elm Street, along the alley. And then I didn't --
8 and then I saw the poles, all of the power poles
9 down the alley. And I didn't see any other lights
10 on those poles. I just saw the one big one that
11 looked like it was behind the first house on the
12 south side.

13 MS. ANDERSON: And there's one at the other
14 end of that same block alley.

15 MR. PIRTLE: Do you know if those are City
16 lights, City --

17 MS. ANDERSON: Similar.

18 THE COURT: I'm pretty sure the one I saw
19 was not a City light.

20 MR. ALKIRE: Right up by -- it's actually
21 closer to behind the second house in. It is
22 behind the second house in.

23 THE COURT: Okay. Well, maybe I --

24 MR. ALKIRE: And it's about ten feet or so
25 from my property line, the pole is.

18

1 the alleyway behind her property. But I think it
2 was agreeable to Mr. Alkire because the light was
3 not on his property.

4 THE COURT: So I'm assuming Ms. Anderson is
5 on the corner?

6 MR. PIRTLE: I think she is directly behind
7 Mr. Alkire's property. And she's here in the
8 courtroom, Your Honor. She can probably --

9 THE COURT: Okay. Because when I looked at
10 the light, you all helped me, I mean, Mr. Alkire's
11 house is the third house in?

12 MR. ALKIRE: Correct.

13 THE COURT: And the light is at the first
14 house in the alley?

15 MR. ALKIRE: Well, it's --

16 MR. PIRTLE: Or is that -- it may be -- or
17 is that a different light?

18 THE COURT: Is that a different light?

19 MR. ALKIRE: I believe so, Your Honor. I
20 believe you're looking at a different light.

21 THE COURT: Okay. Because I didn't see,
22 then, this second light. The second light is
23 right -- and Ms. Anderson lives right behind you?

24 MR. ALKIRE: Yes, Your Honor.

25 THE COURT: Right behind the alley?

20

1 THE COURT: But it's on your side of the
2 street; right? I mean, it's on the south side?

3 MR. ALKIRE: It's on the south side of the
4 alley on the side that my property is on.

5 THE COURT: Is on?

6 MR. ALKIRE: Correct.

7 THE COURT: And Ms. Anderson is on the north
8 side?

9 MR. ALKIRE: That's correct. Right.

10 THE COURT: Okay. Okay. Well, let me hear
11 from Mr. Alkire. Then I'll see what I think we
12 might be able to do. And then I think I'd like to
13 hear from Ms. Anderson, too.

14 MS. EDWARDS: And, Judge, I'm representing
15 Ms. Anderson today. So...

16 THE COURT: Oh, are you? So you are?

17 MS. EDWARDS: Kathy Edwards. I filed an
18 appearance.

19 THE COURT: Yes, you did. I apologize.

20 So, Mr. Alkire, why do you think
21 Idaho Power is responsible for this?

22 MR. ALKIRE: Well, Your Honor, I believe, at
23 least for the purposes of this hearing, that we
24 have to assume that it is, in fact, a nuisance and
25 that Idaho Power knows that it's a nuisance.

21

1 Idaho Power owns the light. They own the pole.
 2 They're actively engaged in maintaining the light.
 3 They put the light up in such a way, using such a
 4 fixture that it causes a nuisance, which is a
 5 crime in the State of Idaho.

6 And as --

7 THE COURT: We're in civil court. We're not
 8 in criminal court.

9 MR. ALKIRE: Well, I understand that.

10 But, you know, Idaho Power's argument,
 11 Your Honor, is that, well, gee, we don't have any
 12 choice in this matter. We're bound by the
 13 applicable statutes and regulations. And so you
 14 should dismiss us from the case because we're just
 15 innocent power providers.

16 But I don't believe that's true, Your
 17 Honor. I think that if allowed to go forward, I
 18 will be able to show in discovery that Idaho Power
 19 exercises quite a bit of discretion as to when
 20 these fixtures are put up, where they're put up,
 21 what type of fixtures are put up, and so on and so
 22 forth.

23 THE COURT: So what do you think is the
 24 solution here, I mean, other than the -- I mean,
 25 it appears to me Ms. Anderson is within her realm

23

1 area. But Idaho Power appears to be incapable of
 2 understanding this concept.

3 I have drawn diagrams. I have given
 4 them mathematical formulas for how to calculate
 5 what sort of a shade would work in this
 6 circumstance. I have even offered to actually
 7 install a shading system myself, all of which have
 8 been rejected by Idaho Power. So I believe I've
 9 gone to extensive lengths to try to ameliorate
 10 this problem.

11 I can't physically access this light.
 12 This light is about 30 feet up in the air on a
 13 power pole. And I have no way to get up there and
 14 install a shade. I have no effective way of
 15 shading this light from my backyard, absent
 16 putting up a huge billboard, which I'm sure would
 17 not be allowed under City building codes.

18 There --

19 THE COURT: So did the light work, as
 20 counsel represents, that they put up last summer?

21 MR. ALKIRE: There was about a one-week
 22 period where they were -- they did install a
 23 shade. They didn't adjust the light. They shaded
 24 the light. But that shade was not very sturdy.
 25 And, about a week after it was installed, it blew

22

1 of reasonableness to request a light, as is
 2 provided.

3 So what should be different?

4 MR. ALKIRE: Well, Your Honor,
 5 Ms. Anderson -- I have no argument with
 6 Ms. Anderson illuminating her property. And, you
 7 know, if she's allowed to do so, then she should
 8 be allowed to put up a fixture that illuminates
 9 her property.

10 However, this light illuminates my
 11 property to a great extent. Basically, my
 12 backyard is underneath a street light. And it
 13 interferes with my enjoyment of my property. And
 14 so I believe that it's a nuisance. And, under
 15 Idaho Law, the nuisance should be abated.

16 Now, how that is abated is not
 17 necessarily my concern. But --

18 THE COURT: I think it should very much be
 19 your concern to figure out how this works. I
 20 mean --

21 MR. ALKIRE: Well, I have actually gone to
 22 extensive efforts to try to explain to Idaho Power
 23 that if you place an opaque object between a light
 24 and another location, that the light can't go
 25 through the opaque object and thus will shade the

24

1 away. So --

2 THE COURT: So it was -- it sort of worked,
 3 but it wasn't -- the design wasn't sufficient to
 4 be a permanent fix?

5 MR. ALKIRE: Exactly. It was just a -- it
 6 was like a piece of cardboard they stuck up there.
 7 And --

8 THE COURT: But it did do the job, if it was
 9 designed so that it was permanent?

10 MR. ALKIRE: Well, yeah. If they shade the
 11 light so it doesn't shine on my property, I don't
 12 have a problem. And --

13 THE COURT: So what would persuade you that
 14 the design is sufficient? I mean, I --

15 MR. ALKIRE: Well, it's very simple. If I
 16 walk out in my backyard, I wouldn't be blinded by
 17 a street light shining in my eyes. That would be
 18 sufficient. But they have been incapable of
 19 achieving that to date. And, in fact, they
 20 represent to me that such a feat is impossible.

21 So, in that case, I am proceeding
 22 forward. Because if they're unable to design a
 23 fixture that does not shed light on my property,
 24 then I'm asking that the light be turned off so
 25 that I can enjoy my backyard.

25

1 THE COURT: Or that a light be installed
2 that doesn't shine in your backyard?

3 MR. ALKIRE: They tell me that such a feat
4 is impossible, that they lack the capacity to do
5 such a thing. That's what I've been advised.

6 THE COURT: Counsel just said that --
7 something else. So...

8 MR. PIRTLE: Yeah. I think we have a
9 disputed fact, Your Honor. I can represent to the
10 Court that Idaho Power's workers have been out,
11 even with this new light fixture that is currently
12 up, and they advised me that there is no light
13 shining in Mr. Alkire's backyard. It would be
14 light coming down and actually shining onto the
15 ground.

16 I think if you were standing in the
17 backyard, you can see that there is a light on the
18 pole, and you can tell when it is on or off. And
19 I think that's --

20 MR. ALKIRE: Your Honor, that's a matter of
21 evidence. And I have pictures. And I'll be glad
22 to introduce evidence and testimony that
23 neighbors --

24 THE COURT: Okay. All right. All right.

25 MR. ALKIRE: But, at this point in time,

27

1 like at least a house down. So I was curious that
2 it got to your yard. But -- okay.

3 Anything you would like to be heard on,
4 from counsel for Ms. Anderson?

5 MS. EDWARDS: Thank you, Judge. And, for
6 the record, my name is Kathy Edwards. I'm
7 representing Ms. Anderson.

8 And, Judge, I haven't filed anything,
9 because obviously what we do depends upon what
10 happens as to Idaho Power. Ms. Anderson's
11 position, without talking about anything from
12 settlement negotiations, is that whatever
13 Idaho Power wants to do to address Mr. Alkire's
14 concerns is fine.

15 And, specifically, when Mr. Alkire was
16 saying he can't climb the pole and maintain the
17 pole, do anything to the light, neither can my
18 client. She requested a light, as she's entitled
19 to do. The light was provided by Idaho Power.
20 She has got the dimmest light possible. Other
21 than that, she doesn't have any control, no
22 authority to maintain, change, alter, shade, or do
23 anything to that light.

24 As the Court just said, the relief, the
25 potential [inaudible] relief in this case, is

26

1 that's a factual determination.

2 THE COURT: Well, it is. Okay. Okay. But
3 as I think maybe both of you know or not by
4 reputation, I just know that almost always the
5 parties have the capacity, much more than the
6 Court, to resolve these kind of disputes, and that
7 you figure something out, and that Idaho Power
8 come up -- I mean, I don't disagree with the
9 premise that you shouldn't have to have her light
10 in your yard.

11 MR. ALKIRE: Thank you, Your Honor.

12 THE COURT: And I just don't -- I agree with
13 that. And I think there's, well, potential
14 finding of a nuisance.

15 What the relief is from this court,
16 though, if I make that finding after a trial, I
17 think is pretty limited. And so I'm just sort of
18 telling you where I see this going.

19 The relief is that they either -- that,
20 in fact, they devise a design that keeps the light
21 from being in your yard, within reason. I mean, I
22 think there has always got to be that level of
23 reason with how much you can totally -- I mean,
24 the light -- I'll have to drive the alley again,
25 because I have this clear sense that the light was

28

1 having Idaho Power change the lighting somehow or
2 alter it or shade it. The relief is not depriving
3 my client of light.

4 So, understanding the factual and legal
5 question I have here, first of all, what is it
6 that my client could possibly do to change this
7 situation? Nothing that she hasn't already done.
8 And, secondly, as far as having any authority or
9 relief against her, there is none available in the
10 case.

11 So my next action in this case is going
12 to be to file our own motion to dismiss. But I'd
13 like to -- I was curious to see what happened here
14 today, first of all, about the Court's nuisance
15 feeling, could it be a nuisance or not. If it
16 could be a nuisance, then, obviously, that's not
17 going to be a ground to dismiss as to Idaho Power
18 or my client.

19 But, as far as my understanding of
20 what's going on, that second light fixture worked.
21 And, apparently, this wasn't a nuisance for over
22 seven years, and it became a nuisance. So that,
23 again, is a factual issue which we contend at
24 trial goes to show that it's not a nuisance. And
25 my understanding is that that fixture, the other

29

1 one, did work and --

2 THE COURT: Blew off.

3 MS. EDWARDS: -- blew off.

4 So Idaho Power offered to --

5 THE COURT: [Inaudible].

6 MS. EDWARDS: -- to make it permanent.

7 Yeah, to make it permanent somehow. And I wasn't
8 present. But, apparently, that's not acceptable.

9 So my question is why my client has to
10 be here, and will be here, mind you, as long as
11 the Court wants us to. But that's my factual and
12 legal question that I'm going to raise in our
13 motion to dismiss.

14 And so that's kind of her perspective.
15 Anything that will resolve the situation, she's
16 good with, short of depriving her of a light on
17 her property.

18 THE COURT: Well, what's the possibility of
19 Mr. Alkire meeting with your engineer to redesign?

20 MR. ALKIRE: We actually did that, Your
21 Honor. Well, I don't know. I don't think he was
22 an engineer. I think he was a technician.
23 Apparently, the engineers are not available to
24 meet. But --

25 THE COURT: Well --

31

1 new housing construction.

2 I just know lighting is huge. And I
3 think your issue is real. And I just don't -- I
4 just can't give up on the belief that there's a
5 solution here that -- with the best minds working
6 on it, and that Idaho Power must have some good
7 design engineers or have access to the latest --
8 because this is not an unusual issue. I mean, it
9 may be here. But I know it's going on all over
10 the country, as they're talking about night light,
11 dark sky ordinances, and all those kind of things.

12 And there's an ordinance, one of the
13 things I pulled up, is in England, where they do
14 have a dark sky. And they do have those
15 requirements that you don't have it in the
16 neighbor's yard. I mean, it has got to be out
17 there, a solution of lights and fixtures.

18 So why can you not try one more time?

19 MR. PIRTLE: Your Honor, if I may, for the
20 record, again, Idaho Power has met many times with
21 Mr. Alkire, has tried to reach resolutions. As
22 the Court has seen a little bit today, and with
23 all due respect to Mr. Alkire, he's a bit
24 insulting to Idaho Power personnel about not
25 having the capacity to understand.

30

1 MR. ALKIRE: -- I did meet with this

2 technician. And I tried to explain how you can
3 shade light by putting an opaque object between
4 the source.

5 THE COURT: Okay. It sounds like, from what
6 you said, you need to be with somebody who
7 understands that concept --

8 MR. ALKIRE: Yeah. And I don't know if
9 anybody at Idaho Power --

10 THE COURT: -- and understands the lights?

11 MR. ALKIRE: -- has that capability. That's
12 an abstract concept they appear to lack.

13 THE COURT: Oh [inaudible], please.

14 MR. ALKIRE: Yeah, well. Yeah, I know.
15 That's the problem.

16 THE COURT: I think -- I just know that
17 there's a whole -- that the whole world of
18 lighting is changing dramatically --

19 MR. ALKIRE: Yeah.

20 THE COURT: -- in terms of the kinds of
21 lights and the whole -- and how you light
22 efficiently and directly and neighborly. That
23 that's a huge, big, changing area, and that
24 there's whole workshops, and there's young
25 architect students working on it and working with

32

1 I think that creates a little bit of
2 tension, which makes it difficult. And that same
3 tension was magnified during the mediation, which
4 I think is why we don't have a resolution.

5 Idaho Power's position is that it has
6 tried --

7 THE COURT: Well, tried --

8 MR. ALKIRE: -- an unbelievable amount of
9 times to try to reach a resolution, and it cannot.

10 It would like to have its motion to
11 dismiss heard today, because I do think that the
12 Idaho Code is very clear on what is a nuisance and
13 what is not. And if it cannot --

14 THE COURT: Before we go there again, let
15 me -- I mean, I -- Mr. Alkire, who do you think
16 would be capable of deciding an appropriate light?

17 You, in your research and the ways,
18 obviously, you have done a bunch about lights and
19 how different lights work. Who in your view knows
20 what's going on in this area?

21 MR. ALKIRE: Well, I imagine there are
22 lighting engineers, Your Honor.

23 THE COURT: Who?

24 MR. ALKIRE: Exactly who? Your Honor, I
25 don't know the name and address and phone number

33

1 of an individual who would be appropriate.

2 THE COURT: Or a company? Or a company that
3 has [inaudible] some interesting lights?

4 MR. ALKIRE: I mean, maybe CH2M Hill. I
5 would think that any competent engineering firm
6 would be able to address lighting issues, Your
7 Honor.

8 THE COURT: But have you identified
9 somewhere -- again, I understand you -- it appears
10 to me that you have taken the light and done your
11 own calculations and done your own research. But
12 who out there -- I mean, like I say, lighting is
13 huge.

14 I know this issue is being addressed in
15 all sorts of places around the world. And why
16 there isn't -- I mean, I don't understand why
17 Idaho Power doesn't have access to it.

18 But since you're the one that's saying
19 you've done the research, and I'm not sure
20 Idaho Power doesn't, but this is solvable without
21 a trial.

22 MR. ALKIRE: Well --

23 THE COURT: And so tell me who you think --
24 or get this resolved.

25 MR. ALKIRE: Your Honor, if I may --

35

1 tried to convey to Idaho Power that if they would
2 simply block the light from coming into my yard,
3 that I would be satisfied. I have been told
4 repeatedly that such a feat is impossible.

5 Now, I am not an engineer. I am not --
6 I'm not a power company. I don't have access to
7 huge numbers of lighting engineers, as Idaho Power
8 does. If Idaho Power tells me that such a feat is
9 impossible, I don't believe that the burden --

10 THE COURT: I'm not hearing that at all
11 today.

12 MR. ALKIRE: Well, that's what I've been
13 told, Your Honor. And I don't believe that the
14 burden should shift to me to prove that
15 Idaho Power is capable of blocking light. If they
16 are maintaining a nuisance, then the law says that
17 it should be abated. This court has the power to
18 order it.

19 Their own regulations say that they can
20 terminate service based on a court order. And so
21 there's nothing that stops this court from abating
22 this nuisance.

23 THE COURT: Well, on that issue, Mr. Alkire,
24 I don't -- I think you're too -- I'm not going to
25 order that it be turned off.

34

1 THE COURT: I mean, I don't think I'm the
2 one. Although, I have some sources, since I have
3 an architect sister, that will take me to people
4 that do lighting engineering.

5 MR. ALKIRE: Your Honor, I'm --

6 THE COURT: I haven't done that. I have
7 only gone and looked at it.

8 So, all right, Mr. Alkire. I won't
9 interrupt you again.

10 MR. ALKIRE: Your Honor, I'm willing to try
11 to find somebody who is a lighting engineer. But
12 the basis of my complaint is that this is a
13 nuisance.

14 If it is, in fact, a nuisance, then
15 this court has the power to order that the
16 nuisance be abated. It is not my obligation, as
17 the person who is being damaged here, which we
18 have to assume for purposes of this hearing, to
19 try to come up with some way for the defendants
20 not to be maintaining a nuisance. It's their
21 obligation to not maintain a nuisance. That's
22 true under both Idaho civil law and Idaho criminal
23 law.

24 And I have tried to -- I have even
25 drawn pictures and done calculations, and I have

36

1 I am going to order -- the most that I
2 would order is that they figure it out, that there
3 is some light in the backyard.

4 And, to get there, as I said in the
5 beginning, and I'm believing it even more after
6 this discussion, that there is a solution and that
7 you all are the ones that figure it out. Because
8 I'm certainly not an engineer.

9 But I am intrigued by it. I really
10 feel that you should not have to have the light in
11 your backyard. But I also believe everybody has
12 got to work on it. And I think it sounds like you
13 have to a certain extent, but I find it curious
14 that you don't -- I mean, you seem to think
15 somebody else can come up with a solution.

16 But I gather you have done a lot of
17 research, but you don't have a suggestion, either.
18 I mean, you -- blocking it off, but of who has
19 manufactured such lights? Who has installed them?
20 How have they worked? How have they been tested?
21 I mean, all of that, if we have a trial, I would
22 expect to hear. But I don't know that you have to
23 go to trial to get there.

24 Okay. Arguments on the motion to
25 dismiss?

37

1 MR. PIRTLE: Thank you, Your Honor.

2 The Court is now intimately familiar
3 with the facts. I think that the issue is pretty
4 simple, is that what Idaho Power is alleged to be
5 doing in the complaint, which is providing this
6 lighting service, is that authorized by statute?

7 If it is, it is not a nuisance, as a
8 matter of law. That much is entirely clear. And,
9 at least from Mr. Alkire's opposition brief, he
10 agrees with that. I think his position was that
11 the rules and regulations that were provided to
12 the Court, the Tariff No. 101 and the schedules,
13 nothing in those provides that Idaho Power does
14 not have the discretion to not provide the
15 service, to not provide the lighting.

16 And I submit to the Court that the
17 opposite is true. Idaho Power does not have the
18 discretion to not provide the lighting service.
19 They are a monopoly. It's a regulated monopoly,
20 regulated by the statutes and the rules and
21 adopted and enforced by the Public Utilities
22 Commission.

23 This is a case where if the lighting is
24 provided as allowed by the schedule, it is
25 something that is authorized by statute. And

39

1 that that is not what the regulation states. I
2 would submit to the Court that that is not -- I
3 guess what is happening, and that is not
4 necessarily what the code section, in defining
5 what sections -- excuse me, defining what is and
6 what is not a nuisance addresses.

7 And I understand the Court's concern.
8 But, from a legal perspective, what can be a
9 nuisance and cannot be a nuisance, anything that
10 is authorized by statute cannot be a nuisance,
11 whether somebody likes what is being done or not.

12 So you may not like the fact that
13 garbage trucks operate on Friday mornings, because
14 you have Friday morning off and the garbage truck
15 wakes you up when it drives by. The operation of
16 garbage trucks is authorized by statutes or City
17 code or some sort of rule, regulation, law. That
18 doesn't mean that it's a nuisance.

19 And that's -- and I'm happy to stand
20 for questions. And I think we have addressed it,
21 and Mr. Alkire addressed it in the briefing. I
22 think we have addressed it. It's a pretty finite
23 issue, and so I don't want to go on.

24 But really this is a circumstance for
25 what Idaho Power is doing is authorized by statute

38

1 Idaho Power is complying with the statute. They
2 cannot on a whim say, "Well, that service might
3 cause an issue with somebody else, so we're not
4 going to provide that." They do not have that
5 discretion at all. And I think that's clear.

6 THE COURT: Well, they have the discretion
7 to provide a service that provides service to
8 their customers and not to other folks?

9 MR. PIRTLE: I think that's true, Your
10 Honor.

11 And I think it's an issue of fact,
12 whether the light is really intruding on
13 Mr. Alkire's property or not. But for 12(b)6,
14 we're assuming that the allegations in the
15 complaint are true. The allegations are they are
16 providing the service, it is a nuisance. And the
17 Idaho Code is very clear. It defines what a
18 nuisance is. And I believe it's the very next
19 code section provides what is not a nuisance, and
20 it is anything that is authorized by statute.

21 And that's our facts scenario.

22 THE COURT: But the statute doesn't
23 authorize you to light Mr. Alkire's yard when
24 you're lighting Ms. Anderson's yard?

25 MR. PIRTLE: I would agree with the Court

40

1 and in compliance with the regulations of the PUC.
2 And that fact alone makes it not a nuisance. And
3 Idaho Power is not the one saying, "Yes, I want to
4 provide this light." They're doing it for a
5 customer who has requested it, which they -- I
6 don't think anybody disputes that they are
7 obligated to do by law.

8 And that's an Idaho Code provision,
9 which is also addressed by the PUC regulations.
10 They have to do it in a safe manner so as not to
11 cause physical injury, you know, personal injury,
12 damages, that sort of thing. But what we have
13 here is it is simply allowed and authorized by the
14 statutes and, in fact, required. Idaho Power does
15 not have the discretion to say, "Well, Mr. Alkire
16 is complaining, saying it's bothering him, so we
17 are not going to provide the light."

18 And I know that we addressed before --

19 THE COURT: Okay. But your argument is
20 going to the point that it appears to me, that I
21 can't tell you not to do the light, but I can
22 still find Idaho Power is creating the nuisance if
23 the light is more than on Ms. Anderson's yard?

24 MR. PIRTLE: No. And that is not my
25 argument. And if I gave that impression --

41

1 THE COURT: Well, that --

2 MR. PIRTLE: And I understand that's the
3 Court's view. And I respectfully disagree.

4 THE COURT: So I -- so Mr. Alkire's argument
5 that I could tell you to shut it off, I agree, I
6 don't think I can do that. But I think I could
7 come to the conclusion that there is a nuisance
8 created in your creating light for Ms. Anderson,
9 if it also shines on Mr. Alkire's lot.

10 MR. PIRTLE: The only way that I think the
11 Court can come to that conclusion is if the Court
12 determines that what Idaho Power is doing is not
13 authorized by statute. And that's --

14 THE COURT: And that the only thing that's
15 authorized by statute is that you provide light to
16 Ms. Anderson's yard?

17 MR. PIRTLE: Pursuant to the tariff and the
18 schedules, yes.

19 THE COURT: I think I can get there. Okay.
20 I mean, I've been a little informal on this
21 because I just can't believe you don't get it
22 resolved.

23 MR. PIRTLE: I understand.

24 And, Your Honor, and I want to make
25 clear, you know, we had that long discussion at

43

1 tariffs, to install dusk to dawn lighting. But
2 their argument, I simply don't think it comports
3 with reason, Your Honor.

4 Under their argument, I would be able
5 to ask that on any power pole anywhere in the
6 county, a dusk to dawn lighting be installed, and
7 they would have no choice but to do so. And
8 that --

9 THE COURT: No. I think there's qualified
10 language about property --

11 MR. ALKIRE: Well --

12 THE COURT: -- about a person's property or
13 business property.

14 MR. ALKIRE: Well, there's also, then, a
15 factual question as to whether or not this light
16 does, in fact, illuminate the property described.

17 There's also the argument that these
18 tariffs have the powers of regulations, rules of
19 regulations. But they don't. They're not part of
20 the Idaho Administrative Procedures Act and
21 they're not adopted pursuant to the Idaho
22 Administrative Procedures Act. These are
23 basically promulgations, and they govern the
24 relationship between Idaho Power and the customer.
25 They don't govern the relationship between

42

1 the beginning, talking about potential resolution
2 and where are we and where can we go. I'll submit
3 to the Court that none of that -- it's great for
4 the Court's understanding of what's going on.
5 It's great for trying to resolve a dispute between
6 the parties.

7 I'll submit to the Court that it isn't
8 anything that this court can really consider on
9 the 12(b)6 motion. It's the Court can consider
10 the allegations in the complaint, the law, and
11 anything that the Court can take judicial notice
12 of. And I submit, I don't think our colloquy this
13 morning would be something that the Court could
14 take judicial notice of in ruling on this motion.

15 THE COURT: Mr. Alkire?

16 MR. ALKIRE: Thank you, Your Honor.

17 Your Honor, if this case is allowed to
18 go forward and discovery is allowed to commence, I
19 believe that we will be able to establish that
20 Idaho Power does, in fact, exercise quite a bit of
21 discretion as to when and how facilities for dusk
22 to dawn lighting are installed.

23 If I understand Idaho Power's argument,
24 they're basically saying, look, we're required, at
25 the request of a customer, pursuant to those

44

1 Idaho Power and a third party.

2 It's essentially a contract -- they
3 essentially fill in the contractual arrangement
4 between Idaho Power and its customer. And so they
5 do not bind third parties, such as me, who are
6 affected by that contractual relationship.

7 The -- you know, the maintenance of a
8 nuisance, as I mentioned before, is a violation of
9 both Idaho's civil and criminal law. And it seems
10 to me that reason would dictate that the statutes
11 and the rules and the regulations of the State of
12 Idaho should not be read in such a way as to be so
13 convoluted as to authorize criminal behavior.

14 That just seems to me to be an unusual
15 way to try to reconcile the statutes. It seems to
16 me that the Court should try to read the statutes
17 in such a way that they authorize reasonable
18 behavior, but not criminal behavior.

19 The maintenance of a nuisance is a
20 crime in the State of Idaho. The evidence in this
21 case will support and will establish that this
22 street light is a public nuisance. It not only
23 affects me, but it also affects my neighbor who
24 this street light shines right in his bedroom, and
25 he has a hard time sleeping at night.

45

1 And so we will be able to show that
2 this type of behavior is a nuisance. It's a
3 public nuisance. It's illegal, and it ought to be
4 abated. And we will ask the Court to enter an
5 order abating this nuisance.

6 This is not something that should be
7 dismissed under 12(b)6. We should be given an
8 opportunity to make our case and to have this
9 problem ameliorated in a manner that complies with
10 the law.

11 Thank you, Your Honor.

12 MR. PIRTLE: Your Honor, may I touch on a
13 couple of the points raised by Mr. Alkire?

14 THE COURT: Yes.

15 MR. PIRTLE: With respect to Mr. Alkire's
16 arguments about the light shining in his
17 neighbor's yard, that is certainly argument and
18 evidence that is not in the record. It's not
19 anything that's alleged in the complaint.

20 THE COURT: Right. I agree.

21 MR. PIRTLE: I don't think it's appropriate.
22 I really don't want to tell the Court what's
23 appropriate for it to consider and not consider,
24 you know, with all due respect to the Court.

25 THE COURT: [Inaudible].

47

1 Idaho Code, it does allow Idaho Power the
2 discretion to -- and I believe his argument in the
3 brief is to simply not provide the service at all.
4 And I submit that that is not true. The law does
5 not support that argument.

6 THE COURT: Ms. Edwards, anything you would
7 like to add to the argument?

8 MS. EDWARDS: Judge, just --

9 THE COURT: Or some clarity?

10 MS. EDWARDS: Just to note that it really
11 solidified my client's position to hear these
12 gentlemen discuss their relative positions today.
13 I came into this and advised Ms. Anderson when I
14 consulted with her about her answer to
15 specifically mention that there was not a claim
16 against her upon which relief could be granted.
17 And we maintain that to this day, Judge.

18 And it's not before the Court, so I'm
19 not going to argue that issue and ask to dismiss.
20 But I would notify the Court and parties, that's
21 our intention.

22 We have clarified today that the Court
23 cannot order Idaho Power to turn off the light,
24 and that if the light is requested, Idaho Power
25 has to provide it.

46

1 MR. PIRTLE: But it is not something that
2 can be considered.

3 I would point out to the Court, the
4 complaint does ask that the light be permanently
5 turned off. That's the relief requested. And I
6 don't think that the Court really needs to get to
7 any of those issues until the Court determines:
8 Is this conduct that Idaho Power is alleged -- or
9 alleged by Idaho Power in the complaint, is that
10 something that is authorized by statute? It
11 clearly is.

12 I don't know that nuisance is a crime
13 in Idaho. I know that the Idaho Code defines what
14 is a nuisance and what is not, and that the courts
15 can, in certain circumstances, abate the nuisance
16 or remedy the nuisance. I don't believe that that
17 involves any sort of, you know, fine, jail time,
18 anything like that. And certainly none of that
19 has been alleged in this case, so I don't know
20 that those arguments really have any bearing on
21 the issue.

22 And I do think that it's important,
23 Your Honor, Mr. Alkire has acknowledged in his
24 opposition brief that he agrees with Idaho Power's
25 argument. He argues that the PUC regulations, the

48

1 Now, the issue of a nuisance, I'll
2 submit to the Court and on counsel's argument, if
3 the Court found that it was not a nuisance, I
4 think the Court would have to dismiss against my
5 client, as well.

6 If the Court declines to make that
7 finding and enter a dismissal against Idaho Power,
8 our next step will be to file our own motion.
9 Because, based on what has been presented in the
10 arguments of both parties and the law on the
11 issue, I don't think any kind of relief could be
12 granted against my client, even if the Court found
13 it was a nuisance.

14 THE COURT: Okay. I am -- I agree with
15 Idaho Power that they are obligated to provide
16 light to customers from dusk to dawn, if
17 requested, so in terms of dismissing. But I
18 disagree that they cannot be responsible for
19 creating a nuisance that the light they're
20 providing to a customer also lights a non-customer
21 who does not want the light and who can show,
22 potentially, that it's harmful and that it's a
23 nuisance. And I think harmful is part of what
24 needs to be shown, not just preference.

25 And so I'm going to deny the motion to

49

1 dismiss, but with that understanding that the
2 question is whether or not there is a
3 responsibility on the part of Idaho Power to
4 ensure when they provide the light, they don't
5 provide it for other people who do not want it.
6 They can show that it's harmful and a nuisance to
7 them.

8 So it appears to me that we need to get
9 this set for a trial.

10 MR. ALKIRE: Yes, Your Honor.

11 THE COURT: And I guess, as a result of
12 these discussions, would there be any merit for,
13 once again, trying a mediation with a skilled
14 design engineer from Idaho Power?

15 MR. PIRTLE: Your Honor, Idaho Power
16 respectfully requests that this court not order
17 another mediation. The last one was not
18 productive, and I don't know that another one
19 would be.

20 THE COURT: Mr. Alkire, would you be willing
21 to be productive in another mediation?

22 MR. ALKIRE: Your Honor, I -- if there
23 was --

24 THE COURT: I mean, I won't order mediation.
25 And, I mean, at this point, it would only work if

51

1 Mr. Alkire doesn't think so.

2 How about you, Mr. Alkire?

3 MR. ALKIRE: Your Honor -- thank you, Your
4 Honor.

5 If there was an individual at
6 Idaho Power who was willing to work with me to fix
7 the problem and be creative in the engineering of
8 a lighting fixture that would fix the problem, I
9 would be more than willing to work with that
10 individual to try to do that.

11 If the -- if Idaho Power continues --
12 has decided that it will continue to take its
13 position, as I understand it -- I understand they
14 don't agree with this, but what I have heard is
15 that it's impossible to fix this problem through
16 use of any sort of engineering. And so --

17 THE COURT: I haven't heard that at all.

18 MR. ALKIRE: Well, I have. I haven't heard
19 it here today in this court, Your Honor, but
20 that's what I have heard informally. And --

21 THE COURT: Okay. I have not heard that
22 today in court, ever.

23 MR. ALKIRE: If Idaho Power were to continue
24 to take that position, then I don't know that it
25 would be productive. But I would be more than

50

1 there was some true desire and belief that there
2 is a resolution and that you both are to find one.

3 And, quite frankly, it does sound like,
4 at this point, you're somewhat polarized, which
5 is, I think, extremely unfortunate for this kind
6 of situation. But both of you will kind of have
7 to recognize that about yourselves and say, yes,
8 we really do want to get a solution here.

9 Because, quite frankly, for
10 Idaho Power, I think this is something that you
11 want to be able to do. I mean, I think this is
12 coming.

13 And, Mr. Alkire, I think you still want
14 to live in that nice neighborhood and get along
15 with your neighbors. And I think there's lots of
16 good reasons why a solution is the realistic way
17 to go on this.

18 MR. PIRTLE: And, for the record, Your
19 Honor, Idaho Power is interested in reaching a
20 resolution that works for everyone. And they
21 always have been.

22 THE COURT: Okay.

23 MR. PIRTLE: So I'll leave it at that, Your
24 Honor.

25 THE COURT: That's all we need to say. And

52

1 willing to try to work with whomever. Idaho Power
2 certainly must have some engineers that have the
3 capacity to deal with this problem. And I would
4 be willing to work with them, if Idaho Power is
5 willing to work with me.

6 THE COURT: Well, I'm hearing Idaho Power is
7 willing. You've got -- I think we're kind of at
8 an interesting stance.

9 But may I suggest that Idaho Power
10 maybe have -- would you be willing to be openly
11 approached by somebody from Idaho Power in the
12 engineering department?

13 MR. ALKIRE: Well, I would be glad to meet
14 with them any time, any place, anywhere, but to
15 try to work this out. But I do believe that I
16 would need to work with an engineer. I don't
17 believe that technicians and attorneys have been
18 effective. I think I would need to meet with
19 somebody who is open-minded.

20 THE COURT: Do you think that there is
21 somebody within Idaho Power compound that could
22 work with Mr. Alkire?

23 MR. PIRTLE: Your Honor, I think the -- I
24 think there is somebody at Idaho Power that could
25 work with Mr. Alkire. I would ask that Mister --

53

1 and this seems like a silly request. But I would
2 ask that the Court order Mr. Alkire to be civil
3 and reasonable and to not raise his voice and to
4 not make insulting comments, which makes it very
5 difficult to resolve this matter.

6 THE COURT: Would you be willing to really
7 work on not raising your voice or making any
8 snide, insulting comments?

9 MR. ALKIRE: Your Honor, I'm trying to be
10 honest. I'm not trying to be insulting. And if
11 he takes it as insulting, I apologize. I never
12 meant to insult anybody. But, at the same time, I
13 do need to be honest in my communications.

14 MR. PIRTLE: The concern that I have, Your
15 Honor, in ordering an engineer to --

16 THE COURT: I'm not going to order anything.
17 I'm going to ask that you set up somebody that
18 would call Mr. Alkire and see if they could meet.
19 And if he can't do it, he can't do it.

20 MR. PIRTLE: Okay.

21 THE COURT: But I was going to ask that you
22 try to do it. Mr. Alkire is saying he's going to
23 work at his very best to be careful of his
24 language. He's a trained lawyer. He should know
25 how to do that. And see if they could have a

55

1 before that and expect all discovery to be
2 completed by then, which would make it June 25th.

3 MR. ALKIRE: Okay.

4 THE COURT: That gives you two and a half
5 months. Is that enough time?

6 MR. ALKIRE: Yes, Your Honor.

7 MR. PIRTLE: I think so, Your Honor. If I
8 may just verify the July 9th is available for me.

9 It is, Your Honor.

10 THE COURT: Okay. And let's have a pretrial
11 on June 25th at 4 o'clock. And, at that time, I
12 would like somebody from Idaho Power to be present
13 that can settle it, maybe.

14 MR. PIRTLE: With authority?

15 THE COURT: Yeah.

16 MR. PIRTLE: Okay.

17 THE COURT: In addition to you, Mr. Pirtle.

18 Well, I appreciate your candor on both
19 sides of this topic. I really do. And I hope a
20 plan is conceived and that you're -- as I keep
21 saying again and again, I know there's a solution
22 here. And I know you want to reach one.

23 And I know you want to keep living in
24 your neighborhood. So I think you want to be open
25 to it. And it sounds like you had one almost. It

54

1 reasonable discussion.

2 And, honest to goodness, as I've said
3 again and again this morning, this is not -- this
4 is a coming issue. I mean, so I know there's got
5 to be technology out there.

6 MR. PIRTLE: We will work, Your Honor. I do
7 think that the technicians are the ones -- they're
8 the ones that work with the light fixtures on a
9 daily basis.

10 THE COURT: And I think you needed that.
11 But you need a designer. I think you really do
12 need a -- or the latest technology.

13 All right. A trial date, are we
14 looking at more than one date?

15 MR. PIRTLE: I can't imagine more than one
16 full -- how does the Court handle its trial dates,
17 Your Honor? Is it like 8:30 to 2:30, or how?

18 THE COURT: I would give you like the whole
19 Wednesday, July 9th.

20 MR. ALKIRE: Wednesday, July 9th?

21 THE COURT: Do you know if that's available?
22 I could give you from 9 o'clock until 4 o'clock.

23 MR. ALKIRE: How long would we have to
24 conduct discovery, Your Honor?

25 THE COURT: I would set a pretrial two weeks

56

1 just wasn't well designed, whatever was put up
2 last summer that worked for a week or so.

3 So I do think design is huge. But I
4 think there's lots of lighting designers,
5 engineers out there, that can work with this
6 thing.

7 So anything else from you, Ms. Edwards?

8 MS. EDWARDS: Judge, may I make a brief
9 scheduling inquiry?

10 We do plan to file our own motion to
11 dismiss. When would the Court like that heard?
12 Usually, on a pretrial date, we don't do that.
13 But I don't want to drag the parties back to
14 court.

15 THE COURT: Well, I sort of have -- there's
16 a meeting -- I would say set it sometime in May.

17 MS. EDWARDS: Any preference, gentlemen?

18 MR. PIRTLE: None from me.

19 MR. ALKIRE: No.

20 THE COURT: Any Wednesday is good.

21 MR. PIRTLE: We'll make it -- I'll make it
22 work.

23 MS. EDWARDS: Any preference that the Court
24 has?

25 THE COURT: In May -- give yourselves a

57

1 little bit of time to see if you can, you know --
 2 late May, early June, before you do it, to obtain
 3 a resolution.

4 MR. PIRTLE: Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 MR. ALKIRE: Thank you, Your Honor.

7 THE COURT: I'm going to take a brief recess
 8 before our 10 o'clock, and I'll be right back, as
 9 well.

10 (The audio-recorded proceedings concluded.)

11 --o0o--
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

58

1 R E P O R T E R ' S C E R T I F I C A T E
 2
 3

4 I, Tiffany Fisher, RPR, Official Court
 5 Reporter, County of Ada, State of Idaho, hereby
 6 certify:

7 That I am the reporter who transcribed
 8 the proceedings had in the above-entitled action
 9 in machine shorthand and thereafter the same was
 10 reduced into typewriting under my direct
 11 supervision; and

12 That to the extent the audio was audible
 13 and intelligible, the foregoing transcript
 14 contains a full, true, and accurate record of the
 15 proceedings had in the above and foregoing cause,
 16 which was heard at Boise, Idaho.

17 IN WITNESS WHEREOF, I have hereunto set
 18 my hand May 8, 2014.
 19
 20
 21

22 Tiffany Fisher, RPR, CSR No. 979
 23 Official Court Reporter
 24
 25


R E P O R T E R ' S C E R T I F I C A T E

I, Tiffany Fisher, RPR, Official Court Reporter, County of Ada, State of Idaho, hereby certify:

That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That to the extent the audio was audible and intelligible, the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand May 8, 2014.



Tiffany Fisher, RPR, CSR No. 979
Official Court Reporter